

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1226**

Wells Fargo Bank, N. A.,
Plaintiff,

vs.

Port Authority of the City of Saint Paul,
Respondent,

Capital City Properties, et al.,
Defendants,

Metro Real Estate Services, LLC,
Appellant.

**Filed May 30, 2023
Affirmed
Jesson, Judge**

Ramsey County District Court
File No. 62-CV-21-6362

Louise A. Behrendt, Bradley J. Lindeman, Meagher + Geer, P.L.L.P., Minneapolis,
Minnesota (for respondent)

William M. Dickel, Wayzata, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Bjorkman, Judge; and
Jesson, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

This case arises from the development and financial demise of a parking ramp in downtown St. Paul. Respondent Port Authority of the City of Saint Paul (Port Authority) purchased property for the ramp from appellant Metro Real Estate Services, LLC (Metro Real Estate) in July 1999 for \$1.5 million, via a subordinate cash-flow note to be paid out of net cash from the parking ramp, if any. After 21 years, Port Authority had yet to make any payments to Metro Real Estate, and Wells Fargo, a superior bond holder, foreclosed on the property, cutting off any chance of payment. During the foreclosure proceedings, Metro Real Estate brought cross-claims against Port Authority. The district court granted Port Authority's motion to dismiss these claims and denied Metro Real Estate's motion for summary judgment. Metro Real Estate appeals. Because Port Authority never exercised its eminent-domain power and Metro Real Estate did not plead its fraud claim with sufficient specificity, we affirm.

FACTS

Port Authority purchased real property¹ from Metro Real Estate in July 1999 to build a parking ramp.² During the negotiations, Metro Real Estate's sole owner, Peter

¹ The property was in an Industrial Development District, created by Port Authority.

² These facts come from documents attached to the complaint in the original action to quiet title and foreclose, documents attached to Metro Real Estate's cross-claim against Port Authority, and an affidavit Metro Real Estate attached to its motion for summary judgment. At the summary-judgment phase, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *STAR Ctrs., Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 76-77 (Minn. 2002).

Luzaich, felt that the sale was undesirable, and he advised Port Authority that he had no further interest in selling the property. Port Authority's then-president informed him that if he did not sell the property to Port Authority, "I will (vulgar expression) eminent domain you." Threatened by that statement, Luzaich agreed to sell rather than "incur further legal expenses and other stress or inconvenience."³

The parties executed a subordinate cash-flow note for \$1.5 million, "with payments on the Note made only out of net cash from of the Ramp, if any." The interest rate on the payments was set at 14%, and the payments were scheduled to end after 30 years. This note was subordinate to the bonds issued by plaintiff Wells Fargo to finance the construction of the parking ramp. The note prohibited Metro Real Estate from recovering from Port Authority if the parking ramp did not generate sufficient funds to pay the purchase price, stating that the note and the obligation of Port Authority to pay on the note "do not constitute a charge, lien, or encumbrance, legal or equitable, upon any property of" Port Authority. The purchase agreement also stated that Port Authority would provide Metro Real Estate with a report "concerning the ramp" each year.

After the purchase, Port Authority leased the property to defendant Capital City Properties to construct the parking ramp. Between 1999 and 2021, it is undisputed that Port Authority made no payments to Metro Real Estate on the cash-flow note. Nor did it send any annual reports.

³ Luzaich's attorney later inquired with Port Authority about its ability to acquire Luzaich's property by eminent domain, and Port Authority sent a letter confirming that it would acquire the property by eminent domain "but for the agreement entered into" between Metro Real Estate and Port Authority.

The financial strength of the parking ramp began to show signs of strain in 2006, when the gross receipts were insufficient to pay anything more than partial debt service on the senior bonds held by Wells Fargo. Between 2006 and 2009, Wells Fargo made debt service payments on the bonds by transferring reserve funds to cover the debt owed. In 2009, the reserve funds were exhausted, and only partial payment on the bonds could be made, which caused Port Authority to default on its debt.

After various attempts at distressed sales and workouts, in December 2021, Wells Fargo foreclosed on the property. Wells Fargo named Metro Real Estate as a party in its foreclosure action against Port Authority because Metro Real Estate had a subordinate interest in the property. In January 2021, Metro Real Estate brought cross-claims against Port Authority, as they were both defendants in the foreclosure action, asking for an order declaring the amount that Port Authority owes Metro Real Estate, claiming invalid and abusive use of eminent domain, and alleging fraud.

Two months later, Port Authority moved to dismiss Metro Real Estate's cross-claims for failure to state a claim. Metro Real Estate opposed dismissal and brought a motion for summary judgment, attaching business record details and Luzaich's affidavit. In the affidavit, Luzaich stated that, "On information and belief," he recently learned that "contemplated parking fees were set too low to generate revenue in excess of mortgage debts to pay my subordinate [cash-flow] note" and that Port Authority's "financial controller at that time advised [Port Authority] that the financial projections could not pay the debts owned [sic] for purchasing" the property. He alleged that, "On information and

belief, I now believe [Port Authority] never intended to tender consideration for [the] property [Port Authority] took. I personally feel that such action amounts to theft.”

After a hearing, the district court issued an order granting Port Authority’s motion to dismiss Metro Real Estate’s cross-claims and denying Metro Real Estate’s motion for summary judgment.

Metro Real Estate appeals.

DECISION

On appeal, Metro Real Estate argues that the district court erred by dismissing its eminent-domain and fraud claims. Because the district court considered additional materials outside the complaint, this action converts Port Authority’s motion to dismiss into a motion for summary judgment. Minn. R. Civ. P. 12.02 (“If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment.”). Accordingly, this court reviews “a district court’s summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). This standard of review applies to the two issues that Metro Real Estate appeals, eminent domain and fraud.

I. The district court did not err in dismissing Metro Real Estate's eminent-domain claim.

Metro Real Estate's eminent-domain argument takes three forms. First, it argues that, because Port Authority never paid for the property, it committed a taking, which is forbidden. Second, it maintains that Port Authority abused its eminent-domain power to coerce Metro Real Estate into selling the property on unfavorable terms. And finally, Metro Real Estate contends Port Authority's actions amount to an inverse condemnation of its property. We address each argument in turn.

Under the Fifth Amendment of the United States Constitution, the government cannot take private property for public use without just compensation. U.S. Const. amend. V. Similarly, under the Minnesota Constitution, "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." Minn. Const. Art. I, § 13. Metro Real Estate posits that Port Authority took its property for a public purpose without compensation because it never paid any money under the cash-flow note. But it is undisputed that Port Authority *purchased* the property from Metro Real Estate with the cash-flow note and never condemned the property via eminent domain. As a result, this argument fails.

Still, Metro Real Estate argues that Port Authority abused its eminent-domain power by threatening to use eminent domain in bad faith during negotiations, citing the letter from Port Authority confirming its ability to use its eminent-domain authority to acquire Metro Real Estate's property. But while it is true that a government body has increased leverage in negotiations due to its eminent-domain power, "that is leverage that the law intends such

an authority to have when it is given the power of eminent domain.” *Lundell v. Coop. Power Ass’n*, 707 N.W.2d 376, 383 (Minn. 2006). A government body with eminent-domain power has the discretion to determine whether negotiation or condemnation is preferable, and Port Authority exercised that discretion here. *Id.* Furthermore, the letter that Metro Real Estate relies on to support the alleged eminent-domain threat was written almost a year after Metro Real Estate *already agreed* to sell the property to Port Authority and executed the purchase agreement.⁴ Accordingly, this eminent-domain claim does not succeed.

Finally, Metro Real Estate likens these circumstances to an inverse condemnation. Inverse condemnation gives “relief to any property owner who can show a direct and substantial invasion of [their] property rights of such a magnitude [they are] deprived of the practical enjoyment of the property and that such invasion results in a definite and measurable diminution of the market value of the property.” *Alevizos v. Metro. Airports Comm’n of Minneapolis & St. Paul*, 216 N.W.2d 651, 662 (Minn. 1974). And Metro Real Estate alleges that, even if its complaint did not properly label the remedy it seeks, the court is within its equitable power to allow it to proceed with its claim. *Wilson v. Ramacher*, 352 N.W.2d 389, 394-95 (Minn. 1984) (stating that at the pretrial stage, a plaintiff should not be denied the right to proceed with an inverse-condemnation action where the pleadings set out the requisite facts for a taking and plaintiff has simply neglected to supply the proper label for the remedy sought). Metro Real Estate contends that because it has been damaged

⁴ The letter was written on May 8, 2000, and the purchase agreement was signed July 21, 1999.

by Port Authority's failure to pay any compensation for acquiring the property, inverse condemnation occurred.

We disagree. Claims for inverse condemnation must be brought through an action in mandamus.⁵ *Nolan & Nolan v. City of Eagan*, 673 N.W.2d 487, 492 (Minn. App. 2003), *rev. denied* (Minn. Mar. 16, 2004). And because Metro Real Estate was no longer the owner of the property when the harm took place, it could not bring a mandamus action, nor does it claim that it ever did.

Further, at the hearing before the district court, Metro Real Estate admitted that the property right that Port Authority had taken was essentially Metro Real Estate's "right to receive a stream of payments out over time." These damages are distinct from inverse-condemnation damages, which deprive a property owner of the practical enjoyment of their property. *Alevizos*, 216 N.W.2d at 662 (describing irritating noise, vibrations, and gaseous fumes due to proximity to an airport as achieving the status of a property right "for which a property owner may demand compensation when it is denied to [them] by government activity"); *Wilson*, 352 N.W.2d at 394 (describing a municipal storm-sewer

⁵ There are two exceptions to this rule, neither of which applies here. *Alevizos*, 216 N.W.2d at 667. First, when a public duty rather than a private duty is involved, there is no need to bring a mandamus action because the benefit or burden of a public duty is such that no particular person has the right to demand performance. *Id.* But because with inverse condemnation, there is always a specific property owner with the right to demand performance, this exception is inapplicable. *Id.* Second, there can be a suit without a mandamus action when such a demand would be met by rejection and therefore would be useless. *Id.* For example, in *Alevizos*, the supreme court held that because residents had complained unsuccessfully in the past and the airport commission initially denied liability, a prior demand would have been rejected and would not have served any useful purpose. *Id.* Because Metro Real Estate has not argued that a demand here would have obviously been met by rejection, this second exception does not apply.

system which collected and directed surface waters from a residential subdivision onto a landowner's property in quantities in excess of what would otherwise be the normal run-off as grounds for an inverse-condemnation claim). Because the damages that Metro Real Estate alleges are not the type of practical-enjoyment-of-property damages that inverse condemnation is meant to address, Metro Real Estate's argument fails for this reason as well.

In sum, the district court did not err in dismissing Metro Real Estate's eminent-domain claim because Port Authority never exercised its eminent-domain power, any leverage that Port Authority exercised during negotiations due to its eminent-domain power is consistent with the law, and the elements of an inverse-condemnation claim are not present.⁶

⁶ Even if the district court did err by dismissing Metro Real Estate's claim on the merits, the claim would be barred by a six-year statute of limitations. Minnesota law prescribes a six-year statute of limitations for an action "for taking, detaining, or injuring personal property, including actions for the specific recovery thereof." Minn. Stat. § 541.05, subd. 1(4) (2022). Metro Real Estate contends that this statute of limitations did not begin to run until its damages were no longer contingent, when Wells Fargo foreclosed on the property. But even if this damages rule applies to eminent-domain claims, a theory that Metro Real Estate has cited neither statute nor case law to support, Metro Real Estate did not need to be aware of all the facts giving rise to an eminent-domain claim for the statute of limitations to begin running. *Sec. Bank & Tr. Co. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 916 N.W.2d 491, 498 (Minn. 2018). It is enough that it should have been aware of some. *Id.* Receiving no payment for 21 years, Port Authority's failure to make payments on the interest on its bonds from 2009 onward, and the lack of any of the promised reports about the parking ramp should have alerted Metro Real Estate to this possibility.

II. The district court did not err in dismissing Metro Real Estate's fraud claim.

The district court dismissed Metro Real Estate's fraud claim for failure to plead fraud with specificity. Metro Real Estate posits that the above facts support its fraud claim because Port Authority never intended to pay Metro Real Estate for the property.

We are not persuaded. To move forward with its fraud claim, Metro Real Estate must plead: (1) a false representation by Port Authority of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce Metro Real Estate to act in reliance thereon; (4) that the representation caused Metro Real Estate to act in reliance thereon; and (5) that Metro Real Estate suffered pecuniary damages as a result of the reliance. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 368 (Minn. 2009). And, as the district court concluded in its careful order, Metro Real Estate made no allegation that Port Authority made any representations to Metro Real Estate about the amount of the excess cash flow, much less a false representation.

Metro Real Estate alleged in its complaint that Port Authority entered into the contract with the knowledge that it would not pay Metro Real Estate for the property because Port Authority set the fees at the parking ramp too low to generate money in excess of the mortgage debts to pay Metro Real Estate.⁷ The complaint states, "Port Authority led [Metro Real Estate] to believe that it was entering into a fair transaction in which [Metro

⁷ Metro Real Estate supports this contention by stating that Port Authority's financial controller at the time advised Port Authority that the financial projections for the parking ramp would not pay the debts owed for purchasing the property.

Real Estate] would receive a fair and agreed price for sale of said property . . . [but these] representations by Port Authority were untrue and fraudulent.” But Port Authority did pay the agreed price for the sale of the property, which was to come from excess cash flow that never materialized. This is not a misrepresentation, and, as a result, Metro Real Estate’s fraud claim cannot succeed, especially given the specific elements that must be alleged for fraud claims.⁸

The only false statement Metro Real Estate alleges that Port Authority made was promising annual reports on the ramp that Metro Real Estate never received.⁹ But Metro Real Estate does not allege that it acted in reliance on that promise.¹⁰ Furthermore, the allegations Metro Real Estate did make were based on information and belief—not supported by documentary evidence in the record. Information and belief is not enough to

⁸ Finally, Metro Real Estate contends that because Port Authority controlled whether ramp operations could generate net proceeds, it gave Metro Real Estate what it knew was worthless compensation for the property. It argues that this amounts to an unconscionable contract. But because this is the first time Metro Real Estate raised this argument or any other contract-based claim, we disregard it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (explaining that an appellate court generally will not consider matters not argued to and considered by the district court).

⁹ Metro Real Estate argues that it should have had more time to conduct discovery to support its claim. But Metro Real Estate is the party who moved for summary judgment, and thus it cannot now argue that there was a lack of discovery on this issue. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003), *rev. denied* (Minn. Nov. 25, 2003) (explaining that a party cannot complain about its own mistake).

¹⁰ This claim is also barred by a six-year statute of limitations. Minn. Stat. § 541.05, subd. 1(6) (2022). Metro Real Estate contends that the district court erred by making findings of fact about the fraud claim that would place it outside the six-year statute of limitations. The district court stated Metro Real Estate should have become aware that Port Authority would never pay Metro Real Estate any money on the cash-flow note and brought its fraud claim more than six years ago. This is not a finding of fact about when Metro Real Estate should have known about its claim, rather, it is a statement about what information Metro Real Estate had available to it in 2009, which neither party contests.

survive the heightened standard for pleading fraud with specificity. Minn. R. Civ. P. 9.02 (“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”).

In sum, the district court did not err in dismissing both of Metro Real Estate’s claims because Port Authority never exercised its eminent-domain power and Metro Real Estate did not plead its fraud claim with sufficient specificity. Even if the district court had erred in these respects, Metro Real Estate’s claims were barred by the applicable statutes of limitations, so we affirm their dismissal.

Affirmed.